IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 145 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JYOTSNABEN RATILAL

Versus

PRAVINCHANDRA TULSIDAS

Appearance:

1. Second Appeal No. 145 of 2002

MR NIRAV C THAKKAR for Appellant

MR RC KAKKAD for Respondent

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 18/1/2003

ORAL JUDGEMENT

1. Jyotsnaben Ratilal appellant - original respondent has filed this Second Appeal under Section 100

of the Code of Civil Procedure, 1908 against the judgment and decree dated 16-4-2001 passed by the learned Joint District Judge, Jamnagar in Regular Civil Appeal No. 57 of 2000 whereby the learned Appellate Judge has allowed the appeal of the original appellant and was pleased to quash and set aside the judgment and decree passed by the learned Civil Judge (SD), Jamnagar dated 9-8-2000. The learned Appellate Judge by his judgment further directed that the marriage between the present appellant i.e. Jyotsnaben and the present respondent i.e. Pravinchandra Tulsidas which took place on 27-6-1988 is declared as null and void under Section 12(1) (a) of the Hindu Marriage Act, 1955 (hereinafter will be referred to as the "Act")

2. The facts leading to this appeal are as under:

2.1 The marriage between Pravinchandra Tulsidas original petitioner -respondent- herein was solemnized with Jyotsnaben original opponent - appellant herein on 21-6-1988. (Hereinafter the parties i.e. the respondent husband will be referred to as the petitioner and the appellant wife will be referred to as the opponent for the sake of convenience). After the marriage was performed when the petitioner tried to cohabit with the opponent, the petitioner came to know that the opponent wife has no vagina and the petitioner - husband was not able to perform sexual intercourse. The petitioner husband also came to know that he was being deceived by the opponent wife. Dr. Miliben Bijendrasinh Dodia (is examined vide exh. 16.) who was a Medical Officer and was working in the Gynecology Department of Irvin Hospital, Jamnagar and she has examined the opponent Jyotsnaben in this case. She has produced all the medical papers in this behalf. From the medical report it appears that coitus of the vagina was only 0.5 inch deep. In view of this physical defect in the vagina, such lady would not be able to have satisfactorily sexual intercourse. She has no uterus. It was first stated that she has no regular monthly manstrual cycle. This means there was no process of discharging blood or other material from the uterus in sexually mature non-pregnant woman at the intervals of about one lunar month until the menopause. She cannot give birth to a child. This examination was done through leproscope.

3. In view of the aforesaid facts and circumstances, though the petitioner husband lived with the opponent wife for some period, ultimately on 18-4-1994 he filed the application u/s 12 (1) (a) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act" for the sake

of brevity) for annulment of the marriage and prayed for decree of nullity on the ground that the marriage has not been consummated owing to the impotence of the opponent. Whatever was stated in the medical report, the petitioner has stated the same thing in his application filed u/s 12 (1) (a) of the Act.

4. Jyotsnaben wife - opponent has filed her reply to the said application vide exh. 27. She has denied the contentions raised by the petitioner in this behalf. She has stated that marriage was solemnized on 21-6-1988 and thereafter they both were living as husband and wife. She has further stated that there was defect she was ensured that because of plastic surgery the same can be cured and she may be able to perform marital obligation. The said reply was filed on 30-7-1994.

5. Before the trial Court the petitioner was examined vide exh. 14. In his deposition he has reiterated the aforesaid facts. He has deposed that the opponent wife was examined by Dr. Miliben Dodiya and she has clearly opined that the opponent wife has no uterus and she is not able to conceive child. Before the marriage the opponent wife did not inform the petitioner in this behalf. Dr. Miliben Dodiya Exh. 16 who has examined the opponent has also stated whatever earlier I have stated about the wife she has stated in her deposition. In support of her say, she has produced medical certificate vide exh. 17 to 21. The opponent wife is also examined vide exh. 31 in this behalf. Part of the medical evidence which has been alleged against the opponent, she has also admitted in her deposition. However, she has denied the womanhood and she was competent to produce child.

5.1 Thereafter, the matter went to the trial Court and the learned Trial Judge by his judgment and decree dated 9-8-2000 dismissed the petition of the petitioner for divorce.

5.2 The learned trial Judge came to the following conclusions :

(i) The petitioner failed to prove that marriage between the petitioner and opponent is not legal and valid.

(ii) The petitioner also failed to prove that the petitioner is entitled to get decree of nullity to annule the marriage between the petitioner and the opponent u/s 12 of the Hindu Marriage Act.

(iii) The petitioner failed to prove that the marriage has not been consummated owing to the defect of the wife.

(iv) The petitioner failed to prove that the marriage is not in contravention of the conditions specified in Clause - 2 of Sec. 5 of the Marriage Act.

(v) The petitioner failed to prove that the consent of the petitioner of that of his guardian was obtained by fraud and thereby the petitioner is not entitled to get divorce.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Judge, the petitioner filed Regular Civil Appeal No. 57 before the District Court, Jamnagar.

7. It may be noted that before the appellate Court, the opponent wife was examined by Dr. U.L. Patel of V.S. Hospital, Jamnagar. He has also opined that there is physical defect to the opponent wife and the petitioner will not be able to have intercourse with the opponent wife. She has no uterus. That certificate is produced before the Appellate Court. It may be noted that for the additional evidence at the appellate stage both the parties had agreed and that i show the additional evidence was produced before the Appellate Court.

8. Thereafter, the Appellate Court heard the learned advocates of the parties at length and decided the appeal on merits and came to the following conclusions.

(i) The trial Court has not erred in holding that the marriage between the petitioner and the opponent is legal and valid.

(ii) However, the trial Court has committed error in holding that the marriage of the parties has been consummated.

(iii) The Trial Court did not erred in holding that the marriage is in accordance with the conditions specified in Clause - 2 of Section 5 of the Hindu Marriage Act.

(iv) The trial Court has not erred in holding that the consent of the petitioner is not proved

to have been obtained by fraud.

(v) The Trial Court has erred in refusing a decree of nullity by annulment of marriage of the parties under Section - 12 of the Hindu Marriage Act.

9. In view of the same, the learned Appellate Judge was pleased to quash and set aside the judgment and decree of the Trial Court and held that the marriage between the parties that took place on 27-6-1988 is declared as null and void under Section 12 (1) (a) of the Act.

10. Being aggrieved and dissatisfied with the judgment and decree of the Appellate Court, the respondent original opponent wife has filed this Second Appeal before this Court.

Submissions of Mr. N.C. Thakkar, learned advocate for wife.

11. Mr. N.C. Thakkar, learned advocate for the appellant has invited my attention to Section 5 of the Hindu Marriage Act which provides the conditions for Hindu Marriage which fall under Chapter - II : Hindu Marriages. He has further invited my attention to Section 12 (1) (a) of the Hindu Marriage Act which is before the amendment of 1976 which reads as under :

"12 (1) - Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity or any of the following grounds, namely:-

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

12. Learned counsel has further referred to Section 12 (1) (a) of the Hindu Marriage Act after the amendment more particularly Clause (i), which reads as under :

"12 (1) - Voidable Marriages :

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

12.1 Learned counselMr. Thakkar has also referred to Section 23 of the Hindu Marriage Act, which provides Decree in Proceedings, which reads as under :

"23 (1) In any proceedings under this Act, whether defended or not, if the court is satisfied that -

(a) x x x x

(b) x x x x

(c) x x x x

(d) there has not been any unnecessary or improper delay in instituting the proceedings, and"

13. The learned advocate for the appellant herein submitted that the Appellate Court has committed error in applying the provisions of Section 12 (1) (c) and 12 (2) of the Act while granting decree of divorce in favour of the petitioner husband. He submitted that the marriage between the parties took place on 21-6-1988. Whereas the petitioner filed application for divorce on 8-4-1994. He, therefore, submitted that if the allegations made by the petitioner-husband before the trial Court and the Appellate Court as well as this Court are true, there was no need for the petitioner - husband to wait for such a long time for filing the application u/s 12 (1) (a) of the Act for divorce. The fact that the petitioner husband waited for a long period of six years after the marriage, itself suggests that the ground agitated by the petitioner against the opponent regarding her physical defect is clearly and afterthought and the same has no basis. He submitted that after some medical treatment the physical defect of the opponent wife can be cured. The husband has not made any other grievance against the opponent wife in this regard.

14. The learned counsel for the wife has further submitted that even the provisions of Section 12 (1) (a) (c) and 12 (2) of the Act are squarely applicable to the

facts of the case. If the husband is able to prove the ingredients of the provisions of aforesaid Sections of the Act and in view of Section 23 1 (d) of the Act there has been unnecessary and improper delay by the husband in instituting the presenting proceedings and therefore in view of the matter, the judgment and decree granted by the Appellate Court is not in consonance with the provisions of Section 23 (1) (d) of the Act and the same is contrary to law and is inconsistence with the principles laid down by the Supreme Court and the Appellate Court ought to have rejected the petition of the petitioner - husband.

Submissions of learned counsel Mr. R.C. Kakkad for opponent-husband.

15. Mr. R.C. Kakkad, has then relied on the decision of the Apex Court in the case of Yuvraj Digvijay Singh V. Yuvrani Pratap Kumari reported in AIR 1970 SC 137, wherein it has been held at para 10 on page No. 139 as under : (The Hon'ble Court was concerned with the amended provisions of the Act.)

" Page No. 135 para 5 : "It will therefor be seen that while the appellant filed the application on the ground that the respondent was impotent, the respondent, in turn, had alleged that it was the appellant who was impotent. The material provision of the Act under which the application was filed by the appellant is Section 12 (1) (a) which is as follows :

"12 (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

15.1 "A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continue to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the

respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

16. Learned advocate for the respondent has relied upon the decision of the Bombay High Court in the case of A Vs. B, reported in (1952) 54 Bombay Law Reporter P.725. In that case also the husband filed suit for declaration that the marriage between the paries was null and void and in the alternative for a decree of divorce. In the plaint, it was contended that the wife no development of vegina cervix and uterus or the genital track and the internal organs. The wife had also no menstrual period since the marriage upto filing of the suit and therefore the husband incapable of having sexual intercouse. So, he was unable to consummae the marriage. In that context, the Bombay High Court after relying upon several "Sanskrut" scriptures has held on page 747 at apra 14 as under :

16.1 "Page No. 747 para 14 : We next have Narada XII-19 which I have quoted earlier. That verse emphasizes the fact that the wife is the field and the husband is the giver of the seed. It also says that the field should be given to the person who has the seed and that the person who has no seed does not deserve the field. It would follow therefrom that if there is no field there can be no question of marriage, because according to this verse of Narada women are created for the purpose of procreation, and if they cannot procreate, they cannot be wives."

16.2 "Page No. 748 para 15 : Mantras for the sacrament can only apply to kanyas, by which is meant girls who are virgo intacta (whose yoni is uncut"). Kulluka in his commentary points out that marriage with a virgo intacta is religious but marriage with a girl who is not a virgo intacta is not forbidden although it maybe (not approved by religion). But the emphasis os Viramitrodaya obviously is not on whether the "yoni" (genital organ) is cut as on the fact that the woman must possess a "yoni", whether cut or or uncut, and if she does not possess one, she cannot be considered to be a "kanya" and cannot

be married."

16.3 "Page No. 750 para 28 : "On a review of all these texts, it seems to be beyond doubtful that the marriage of an impotent, whether a male or a female, is absolutely null and void under Hindu Law."

17 The learned counsel has relied upon the judgment of this Court in the case of Suvarnababen V. Rashmikant Chinubhai Shah reported in AIR 1970 Gujarat 43 (V 57 C T) has held in para 11 at page 46 and 47, as under :

17.1 "Page Nos. 46 & 47 para 11 : I shall refer to these observations presently but before I do so it will be convenient to refer to two aspects of impotency in so far as they may have a bearing on the availability of corroborative evidence. the essential ingredient of impotency is the incapacity for accomplishing the act of sexual intercourse and in the context it means not partial or imperfect, but a normal and complete coitus. This incapacity may arise either from a structural defect in the organs of generation which is incurable and renders complete sexual intercourse impracticable or from some incurable mental or moral disability vis-a-vis the other spouse resulting in inability to consummate marriage.

18. The learned counsel has relied on the decision of the Delhi High Court in the case of Mrs. Rita Nijhawan Vs. Balkrishnan Nijhawan reported in AIR 1973 DELHI 200. In para 7 on page 207, it is observed as under :

"Page 207 para 15 - Impotency is the lack of ability to perform full and complete sexual intercourse. It has been accepted partial and imperfect intercourse is not consumption and if a party (husband) was in capable of performing the sexual intercourse fully he would be in law deemed to be impotent, vide Snowman (otherwise Bensinger) V. Snowman 1934 PD 186.

Any penetration however transient cannot amount to consummation of marriage vide

(otherwise K) V. . 1967-3 ALL ER 178.

19. The learned advocate appearing on behalf of the petitioner - husband has cited the decision of the Delhi High Court reported in AIR 1982 Delhi 272.

19.1 "Page No. 274 para 8 : From this report learned counsel for the appellant urges that Court ought to disagree with the finding of the learned Additional District Judge that the wife was not capable of having sexual intercourse. As noticed above, there is no cross-examination regarding the fact that the marriage had been consummated at all. It has been established that the husband could not consummate the marriage because it was not possible for him to penetrate for more than an inch or so. The Medical Report R/1, to my mind, supports the contention of the husband notwithstanding the opinion given by the doctors. In the present case in view of the fact that the vagina was artificially created and that it was only of 3" in depth, it cannot be held that the wife was capable of performing sexual intercourse. The present is not a case where the wife was psychologically adverse to perform sexual intercourse."

(In para 14 the Court has observed as under)

19.2 "In the present case the finding of the learned Additional District Judge that the wife was incapable of performing complete sexual intercourse has to be upheld. It is well settled that imperfect and partial intercourse would not amount to consummation of marriage. (See Rita Nijhawan V. Balkrishan Nijhawan, AIR 1973 Delhi 200)."

20. The learned counsel has relied upon the judgment of the Madras High Court in the case of T. Rangaswami V. T. Aravindammal reported in AIR 1957 Madras 423 has held in para 5 and 6 on page 245 as under :

20.1 "Page 245, para (5) : Impotence is defined as lack of ability to perform sexual act and sterility is defined as lack of ability to procreate children. Questions of impotence and sterility arise when divorce is sought (a) because, marriage cannot be consummated (i.e. of complete sexual intercourse), (b) if incapacity

for consummation cannot be surgically remedied, or, the defective party is unwilling to submit to a surgical operation; or (c) if the incapacity existed before marriage. (Sterility, by itself, offers no ground for divorce). Impotence is attributed to injury to head, neck or lins.

(6) - Potence in case of males means power of erection of of the male organ 'plus' discharge of healthy semen containing living spermatozoa and in the case of females means (1) development of external and internal genitals and (2) ovulation and menstruation."

21.2 The learned counsel has relied upon the Andhra Pradesh High Court in the case of Gudivada Venkateswararao Vs. Smt. Gudivada Nagamani, reported in AIR 1962 Andhra Pradesh 151 l(V 49 C 42) in para 6 and 7 on page 152 has held as under :

"Page 152 -

(6) As pointed out in Rangaswami V. Arvindammal, AIR 1957 Mad. 242 the marriage would be avoided or dissolved on the ground of impotence if it is established that at the time of the marriage either of the spouses was incapable of effecting the consummation either due to structural defect in the organs of generation rendering complete sexual intercourse impracticable or due to some other cause.

"A party is impotent of his or her physical or mental makes consummation of marriage a practical impossibility, invincible and persistent repugnancy on the part of the respondent to the act of consummation amounts to impotency. Impotency means inability to perform sexual act or inability to consummate the marriage."

22. The learned advocate the petitioner has further relied on the decision of Madras High Court in the case of B. Sivanandy V. Bhagavathyamma, reported in AIR 1964 Madras 237 and on the decision of the Calcutta High Court in the case of Samar roy Chowdhury V. Sm. Snigdha Roy Chowdhury reported in AIR 1977 Calcutta 231.

22.1 As regards delay, the learned counsel has relied on the decision of the Delhi High Court in the case of Vinod Chandra Dube V. Smt. Aruna Dube, reported in AIR 1977 Delhi 24, wherein at page 28 para 32 it is observed as under :

"It is true that delay had to be explained by the petitioner before he could be granted relief. The onus of proving that delay is inexcusable is on the respondent to the petition who seeks to get it dismissed. In cases where the respondent is ex parte the court may itself make the objection in obvious cases. But what seems to have happened in this case is that question of delay attracted the attention of the learned Judge when he was preparing the judgment and not earlier. He, therefore, dismissed the petition."

23. The learned counsel has further relied on the decision of the Apex Court in the case of Praveen Mehta V. Inderjit Mehta, reported in 2002 AIR SCW 2886, wherein at para 22 on page 2895 it is observed as under :

"Judge in the light of the principles discussed above what we find is that right from the beginning the matrimonial relationship between the parties was not normal; the spouses stayed together at the matrimonial home for a short period of about six months; the respondent had been trying to persuade the appellant and her parents to agree to go for proper medical treatment to improve her health so that the parties may lead a normal sexual life; all such attempts prove futile. The appellant even refused to subject herself to medical test as advised by the doctor. After 21st June, 1987 she stayed away from the matrimonial home and the respondent was deprived of her company. In such circumstances, the respondent who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy and also social embarrassment due to the behaviour of the appellant. Further, the conduct of the appellant in approaching the police complaining against her husband and his parents and in not accepting the advise of the superior judicial officer. Mr. S.K. Jain and taking a false plea in the case that she had conceived but unfortunately there was miscarriage are bound to cause a sense of mental depression

in the respondent. The cumulative effect of all these on the mind of he respondent, in our considered view, amounts to mental cruelty caused due to the stubborn attitude and inexplicably unreasonable conduct of the appellant."

24. Conclusion : What is marriages ?

24.1 Marriage as Sacrament - "Probably, no other people have endeavoured to idealize the institution of marriage as the Hindus have done. Even in the patriarchal society ofthe Rig Vedic Hindus, marriage was considered as a sacramentalunion. And it continued to be so in the entire Hindu period, and even in our contemporary world most Hindus regard their marriage as a sacrament. We find the following passage in the Manu Smruti :

I hold your hand for Saubhagya (good luck) that you may grow old with your husband, you aregiven me by the just, the creator, the wise and by the learned people.

24.2 Manu enjoins on the wife that she should become a paturnuvrate i.e., she should follow the same principles as her husband. According to theRig Veda :

Be thou mother of heroic children, devoted to the Gods, be thou queen in the father-in-law's household. May all Gods unite the hearts of us two into one.

24.3 Wife is also ardhangini (half of man). According to the Saptatha Brahmana. The wife is verify the half of the husband. "Man is only half, not complete till he marries." The Taittiriya Samhatta is to the same effect., "half is she of the husband that is wife". From this notion of unity of peersonality of husband and the wife, mutual fidelity of husband and wife is implied. Manu declared that mutual fidelity between husband and wife is the highest dharma. Manu furher said that once a man and woman are united in marriage, they must see that there is no difference between them, and that they remain faithful to each other.

25. Section 12, prior to its amendment in 1976, stated that the the respondent was impotent at the time of the marriage and continued to be so until the institution of proceeding. By the Amending Act of 1976 the substituted clause emphasises the element of nonconsummation of the marriage owing to the impotence of the respondent. Medical evidence may establish that the petitioner wife has remained a virgin and the court may presume that the requirements of the amended clause are satisfied. Clause (a) of sub-s (1) makes it abundantly clear that a marriage solemnized whether before or after the commencement of the Act is voidable at the instance of either party on the ground of nonconsummation of the same due to the impotence of the other party to the marriage and may be annulled by a decree of nullity of marriage. The marriage of a female with a male who was impotent and who had not been able to consummate the marriage is a nullity.

26. What is meant by impotent : Impotence means the incapacity to perform full and natural sexual intercourse. It may be due to an organic defect or due to invincible repugnance or hatred for sexual intercourse in general or with reference to a particular person or due to some loathsome and incurable disease like syphilis which incapacitates the individual from having sexual intercourse. It need not be due to physical incapacity and may be caused by the mental or physical condition which would render normal intercourse impossible though such mental condition may not amount to unsoundness of mind, insanity or idiocy."

(Re.Mayne's Hindu Law & Usage, 13th Edition, at page 207)

27. "A person is impotent if his physical or mental condition makes consummation of marriage a practical impossibility. Impotency may arise on account of physical defect or mental condition such as total repugnance to be sexual act. It may be well arise qua a person qua the other spouse quoad hune or hane. In other words, invincible and persistent repugnancy on the part of the respondent to the act of consummation amounts to impotency."

(Re. : Paras Diwan "Law of Marriage and Divorce, 4th Edition. Page NO. 286.

27.1 Impotency : Non-consummation of Marriage owing to Impotence under Modern Law.

"In the modern law there is still a controversy on the question whether the marriage of impotent personshould be null and void or merely voidable. The reason seems to be this : Just as under Hindu law so under some other systems, impotency related to the physical capacity of the parties or incapacity to consummate the marriage, and if this capacity was lacking marriage was treated as null and void. The notion was that if at the time the solemnization of the marriage any party lacked capacity to consummate the marriage, no marriage could come into existence. In short, the physical capacity was as much a basic requirement of marriage as mental capacity."

(Ref. Page 285 Paras Diwan, "Law of Marriage and Divorce" 4th Edition.

27.2 "A party is impotent of his or her physical or mental makes consummation of marriage a prctical impossibility, invincible and persistent repugnancy on the part of the respondent to act of consummation amounts to impotency ? Impotency means inability to perform sexual act or inability to consummate the marriage."

Ref. Page 99 -100 Paras Diwan, "Modern Hindu Law", 11th Edition.

27.3 In the aforesaid facts and circumstances of the

case, I have considered the rival contentions of the parties and the decisions cited by the learned advocates for the parties. I have also considered the entire evidence produced by the husband against the wife. The husband has been able to prove the ingredients of Section 12 (1) (a) of the Act. I have also considered the provisions of Section 23 (d) of the Act. It is no doubt true that the marriage between the parties took place in the year 1988 and the present application has been filed in the year 1994. However, looking to the peculiar facts and circumstances of the case, I am of the view that there is no unnecessary or improper delay in filing the application u/s 12 (1) (a) of the Act though he came to know about incapacity the wife he has waited for some time because he was of the view that after sometime due to medical science she may be able to conceive the child and therefore the petitioner husband has waited for some time i.e. upto 1994.

27.4 In my view. the reasonings of the Appellate Court granting divorce are legal and valid. I do not see any substantial question of law raised by the appellant original opponent wife in the present second appeal and therefore the judgment and decree of the Appellate Court is to be confirmed. Therefore, this Second Appeal is dismissed with no order as to costs. The judgment and decree of the Appellate Court is confirmed.

Maintenance.

28. After hearing is over, Mr. Thakkar learned advocate for the appellant - wife submitted that some maintenance amount may be given to the appellant - wife if the Court is of the view that the decree of divorce is granted to the husband. He has invited my attention to the judgment of this Court in the case of Patel Dharamshi Premji V. Bai Sakar Kanji, reported in AIR 1968 Gujarat 150. He has submitted that once the wife will be divorcee and looking to her condition, she is not in earning capacity and therefore some reasonable maintenance amount may be given to her so that she can maintain herself.

28.1 The learned advocate for the appellant - husband further submitted that even if the Court comes to a conclusion in favour of the respondent husband, then also the appellant - wife is entitled to get maintenance u/s 25 of the Hindu Marriage Act Law even though the marriage has been declared nullity u/s 12 of the Hindu Marriage

Act. He submitted that the Decree of four kinds can be passed under the Act, which are as under :

i. Decree for restitution of conjugal rights under Section 9;
ii. Decree for judicial separation under Section 10 or 13-A;
iii. Decree of nullity of marriage under Section 11 when marriage is void, or under S. 12 when marriage is voidable; and
iv. Decree for divorce under Section 13 or 13-B.

28.2 The learned counsel submitted that it has been held that Section 25 applies to all these decrees irrespective of difference in their nature. He has further submitted that u/s 25, he words 'wife' and 'husband' are used. If these words are strictly interpreted they will not apply to a case where the decree of nullity of marriage is passed under Section 11 or 12 or of divorce under Section 13 or 13-B. The result will be that alimony will not be granted on the passing of these decrees. But the Courts have held, and rightly too, that these words are to be interpreted liberally and they refer to the status of the parties before passing the decree granting substantive relief.

28.3 He has relief on the decision of this Court in the case of Patel Dharamshi Premji Vs. Bai Sakar Kanji, reported in AIR 1968 Gujarat 150, after considering the English Statute, Denning , L.J. in the case of Clear V. Clear and sydenham V. Sydenham & Illingwoth and other cases, this Court has observed in para 7 at page 155 as under :

"at para 7 page 155 - What has been said in these passages in regard to the English Statute applies with equal force to our Act. On a parity of reasoning, we hold that under Section 25 permanent alimony can be granted even to an erring spouse and the mere fact that the respondent did not comply with the decree for restitution of conjugal rights and that was the cause of passing of a decree against her cannot by itself disentitle her to claim permanent alimony under the Section."

28.4 Relying upon the above judgment, he has submitted that some reasonable amount of maintenance may be given to the appellant wife so that she can maintain herself.

28.5 He has also relied on the decision of the Rajasthan High Court in the case of Smt. Laxmi Devi V. Babu Lal, reported in AIR 1973 Rajasthan 89. In that case, even though the marriage was annulled on the ground of impotency of the wife, in para 15 the Court observed as under :

"para 15 page page 93 - The result is that I allow the appeal, in part. While I maintain the judgment and decree of the learned District Judge regarding the annulment of the marriage. I order that the respondent husband shall pay Rs.50/- per month to the appellant wife as her maintenance during her lifetime till she remarriages. The parties are, however, left to bear their own costs."

28.6 The learned counsel has then relied on the decision of the Bombay High Court in the case of Smt. Rajeshbai and others V. Smt Shantabai reported in AIR 1982 Bombay 231. In that case also the Bombay High Court has granted maintenance though the marriage was declared null and void.

28.7 He has orally prayed for maintenance and that may be treated as an application u/s 125 of the Cri. Pro. Code and this Court may consider oral request for maintenance in this behalf.

29. On the other hand Mr. R.C. Kakkad,learned advocate for the respondent husband has relied on the provisions of Section 25 of the Hindu Marriage Act and submitted that for getting permanent alimony and maintenance the mandatary requirement of the section is that the application is necessary and therefore in the said section. He has also submitted that no maintenance application is made by the appellant wife either before the lower court or before the Appellate court or before this Court and therefore the applicant is not entitled to get any maintenance in this behalf. He submitted that before granting maintenance, maintenance application is necessary. He has further submitted that in this case it is held that the wife was declared to be impotent and decree of nullity on the ground of impotency of the wife is proved. Under these circumstances, the appellant wife is not entitled to get any maintenance from the respondent - husband. In support of his aforesaid contentions, he has relied the judgment of Punjab and Haryana High Court in the case of Amar Nath V. Smt. Shakuntala, reported in 1983 HLR 169 and another judgment

in the case of the Andhra Pradesh High Court in the case of K. Sivarama Krishna Prasad V. K. Bharathi and another, reported in 1986 CRI.L.J. 317, wherein the Court has held that "Definition of wife - Cannot be stretched, associated or linked to nullity of marriage envisioned u/s 11 or 12 of Hindu Marriage Act - It is solely confined to situation of divorce only till remarriage. It is held that Section 12 is also concerned with annulment of marriage by a decree of nullity on the grounds enumerated therein and the marriage can be avoided at the initiative by the aggrieved or concerned person. The end-all of both the provisions is a decree of nullity. Nullity postulates a full-fledged cession of marital tie or connection. On conjoin reading Section 12 and 16 of the Act, he has relied on page 319 and submitted his submissions in this behalf.

30. In view of the aforesaid submissions, he submitted that if any amount is awarded then it amounts to awarding a premium to the person who has cheated the husband by suppressing her physical defect.

31. I have considered the contentions of the learned advocate for the appellant - wife and also learned advocate for the respondent - husband. It is no doubt that the wife has deceived the respondent - husband and legally the appellant - wife is not entitled to get any maintenance amount from the respondent - husband. However, looking to the physical condition of the appellant wife who is present in the court, I am of the view that if the respondent - husband may pay Rs.7,500/in all as maintenance amount, it would be in the interest of justice.

(K.M. Mehta,J.)

/JVSatwara/